A

Foo Sam Ming v Archi Environ Partnership

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–305 OF 1999

GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA

19 JANUARY 2004

B

Civil Procedure — Appeal — Fact, finding of — Appeal to Court of Appeal on question of fact — Whether interference of Court of Appeal called for — Whether Court of Appeal to defer to views of trial judge

Contract — Building contract — Claim for work done — Architect's fees in accordance with PAM scale of fees — Whether architect entitled to claim for such fees where building works do not commence

C

Evidence — Witness — Credibility of — Oral testimony of witness inconsistent with contemporary documentary evidence in witness' own hand — Whether such oral testimony may be rejected in favour of contemporary documentary evidence

D

In this appeal, appellant's counsel raised three issues. The first was whether the respondent had been appointed as an architect for a project that the appellant had in plan. This question, said counsel, should receive a negative response. It was further submitted that even if the first question was answered in the affirmative, there was a second question the answer to which should be in the appellant's favour. That question was whether the employment had been by the appellant personally or whether it had been by the company of which the appellant was a director. Counsel complained that this issue was completely overlooked by the trial judge. The third and final issue concerned the quantum claimed by the respondent and awarded by the trial judge.

E

F

Held, dismissing the appeal with costs:

(1) On the facts, the trial judge had approached the question of appointment by preferring the contemporaneous documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant on oath. The Court of Appeal was of the view that the trial judge was extremely fair in her treatment of the appellant as a witness. Having carefully studied his oral evidence and having compared it with the contemporaneous documents, the Court of Appeal had no doubt that that any reasonable tribunal similarly circumstanced as the trial judge in the instant case would have concluded that the appellant was not a truthful witness. There was accordingly no merit in the appellant's submission that the first issue should be resolved in his favour (see paras 4–8); *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 and *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 followed.

G

H

(2) There was no merit in the appellant's submission that the trial judge had overlooked the second issue. The trial judge clearly found that the appellant had acted in his own person in appointing the respondent and had undertaken personal responsibility for the respondent's fee. In the instant case, the appellant had signed the documents material to the

I

appointment of the respondent without any qualification. Therefore as a matter of principle, the appellant must be held to have personally bound himself to the respondent in the matter of the respondent's appointment (see paras 9–10); *Ching Yuen Tung v BEP Akitek* [1978] 1 MLJ 211 followed.

(3) According to the trade and custom of his profession, an architect is entitled to ask for payment in accordance with the PAM scale of fees where he does the work but the building works do not for any reason commence, for instance where the project is abandoned. In the instant case, the respondent made its claim in accordance with the PAM scale of fees. This was the sum for which the trial judge entered judgment. There was thus no merit in the appellant's submission that there ought to have been an assessment of the fee on a quantum meruit (see para 11); *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 (HC) and *Udachin Development Sdn Bhd v Datin Peggy Taylor* [1985] 1 MLJ (FC) followed.

(4) This appeal was an appeal on a question of fact. The function on the Court of Appeal in an appeal on a question of fact is to defer to the views of the trial judge who had the obvious audio-visual advantage over oral testimony. In the instant case, it would be wrong for the Court of Appeal to interfere (see para 12).

[**Bahasa Malaysia summary**

Dalam rayuan ini, peguam perayu telah menimbulkan tiga persoalan. Pertama, sama ada responden telah dilantik sebagai arkitek untuk satu projek yang perayu ingin laksanakan. Persoalan ini, kata peguam, hendaklah menerima jawapan yang negatif. Ia telah dihujahkan bahawa meskipun persoalan pertama dijawab secara positif, terdapat persoalan kedua yang mana jawapannya hendaklah menyebelahi perayu. Persoalan tersebut adalah sama ada pekerjaan tersebut adalah oleh perayu secara peribadi atau sama ada ia adalah oleh syarikat yang mana perayu adalah pengarah. Peguam mengadu bahawa persoalan ini telah terlepas perhatian oleh hakim perbicaraan. Persoalan ketiga dan terakhir adalah berkaitan kuantum yang dituntut oleh responden dan diawardkan oleh hakim perbicaraan.

Diputuskan, menolak rayuan dengan kos:

(1) Berdasarkan fakta-fakta, hakim perbicaraan telah meneliti persoalan perlantikan tersebut dengan merujuk kepada dokumen-dokumen sezaman daripada penjelasan-penjelasan lisan yang lemah dan lewat dan tidak meyakinkan yang diberikan oleh perayu atas sumpah. Mahkamah Rayuan berpendapat bahawa hakim perbicaraan amat adil dalam layanan terhadap perayu sebagai saksi. Setelah meneliti keterangan lisan beliau dan membandingkannya dengan dokumen-dokumen sezaman, Mahkamah Rayuan tiada keraguan bahawa mana-mana tribunal yang munasabah dalam keadaan yang sama seperti hakim perbicaraan dalam kes semasa akan memutuskan bahawa perayu bukan seorang saksi yang bercakap benar. Oleh demikian tidak terdapat apa-apa merit dalam hujah perayu bahawa persoalan pertama hendaklah diselesaikan menyebelahinya (lihat perenggan-perenggan 4–8); *Tindok Besar Estate*

Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 dan *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257 diikut.

(2) Tiada merit dalam hujah perayu yang hakim perbicaraan telah terlepas perhatian terhadap persoalan kedua. Hakim perbicaraan dengan jelas mendapati bahawa perayu telah bertindak sebagai dirinya sendiri semasa melantik responden dan telah bertanggungjawab secara peribadi terhadap yuran responden. Dalam kes semasa, perayu telah menandatangani dokumen-dokumen yang penting berhubung perlantikan responden tanpa apa-apa kelayakan. Oleh itu mengikut prinsip, perayu harus terikat secara peribadi dengan responden dalam perlantikan responden (lihat perenggan-perenggan 9–10); *Ching Yuen Tung v BEP Akitek* [1978] 1 MLJ 211 diikut.

(3) Menurut perniagaan dan amalan profesyen beliau, seorang arkitek berhak bertanyakan tentang bayaran menurut skala yuran PAM di mana beliau telah melakukakn kerja tetapi kerja-kerja pembangunan tidak dimulakan kerana apa-apa sebab, contohnya di mana projek tersebut terbengkalai. Dalam kes semasa, responden membuat tuntutannya menurut skala yuran PAM. Inilah jumlah yang dimasukkan dalam penghakiman oleh hakim perbicaraan. Oleh itu tiada merit dalam hujah perayu bahawa sepatutnya terdapat satu penaksiran yuran berdasarkan kuantum meruit (lihat perenggan 11); *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 (MT) dan *Udachin Development Sdn Bhd v Datin Peggy Taylor* [1985] 1 MLJ (MP) diikut.

(4) Rayuan ini adalah satu rayuan berhubung persoalan fakta. Fungsi Mahkamah Rayuan dalam satu rayuan berhubung persoalan fakta adalah untuk mengikut pendapat hakim perbicaraan yang dengan jelas mempunyai kelebihan audio-visual ke atas keterangan lisan. Dalam kes semasa, adalah salah untuk Mahkamah Rayuan campur tangan (lihat perenggan 12).]

Notes

For cases on claims for work done, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2445–2453.

For cases on the credibility of witnesses, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2531–2556.

For cases on finding of facts, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 729–819.

Cases referred to

Ching Yuen Tung v BEP Akitek [1978] 1 MLJ 211 (refd)
Datin Peggy Taylor v Udachin Development Sdn Bhd [1984] 1 MLJ 85 (folld)
Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257 (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (folld)
Udachin Development Sdn Bhd v Datin Peggy Taylor [1985] 1 MLJ (folld)

Wong Kim Fatt (Adeline Goh with him) (Wan Nadhri Tan & Co) for the appellant.
Kumar Kanagasingam (Rosli Dahlan with him) (Allen & Glenhill) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): A

[1] Let me say at the very outset that this appeal involves no question of principle. It involves, as do so many of the appeals that we are called upon to decide, a pure question of fact based upon the credibility of witnesses.

[2] I am happily spared a recitation of the facts of this case. The history of the dispute, the state of the pleadings and the relevant evidence are all set out *in extenso* in the judgment of the learned judge. She has also identified the issues that she was called upon to try. B

[3] Before us, counsel for the appellant identified three issues, which he said, lay at the heart of the appeal. The first is whether the respondent had been employed as an architect for a project that the appellant had in plan. C This question, said counsel, should receive a negative response. It was further submitted that even if the first question was answered in the affirmative, there was a second question the answer to which should be in the appellant's favour. That question is whether the employment had been by the appellant personally or whether it had been by the company of which the appellant was a director. Counsel complained that this issue was completely overlooked D by the learned judge. The third and final issue has to do with the quantum claimed by the respondent and awarded by the learned judge.

[4] Counsel on both sides took us through the evidence with meticulous care. I am grateful to them for their efforts. But at the end of the day, the evidence before the judge more than sufficiently supports her finding that it E was the appellant who personally appointed the respondent to draw plans for the project in question. Counsel for the appellant repeatedly referred us to his client's oral evidence denying the appointment. However, our attention was drawn by counsel for the respondent to contemporary documentary evidence in the appellant's own hand that contradicted his *viva voce* testimony. The learned judge approached the question of appointment by preferring the contemporaneous F documents to the rather tenuous and tardy and unconvincing oral explanations given by the appellant on oath. This is how she put it:

> Thus after scrutinising the oral evidence of the two main actors, namely PW1 and DW1 I am of the opinion that there are two conflicting versions as regards the alleged appointment of PW1. However when the two versions are compared with the documentary evidence and the conduct of the two parties, I find that PW1's version G is more probable. In fact DW1's own oral testimony also shows that he was very interested in engaging PW1. This can be seen from the elaborate discussions between the parties; the fact that DW1 had given PW1 all the relevant documents pertaining to the two pieces of property, namely Lot 1578 & Lot 7272, and the fact that DW1 wrote to PW1 urging him to complete the plans for submission. (See Exhibits P2, P3, P4, P7, P8, P9, P11, P12, P13, P14 and P16). Furthermore, from Exhibits H P12, P13 and P14, it is clear that the defendant acknowledged receipts of the plans, yet he said he was not interested in them. I find this difficult to believe as no reasonable person would accept anything that he/she does not want. I also cannot accept DW1's evidence that the plans were to be submitted to Jabatan Perancang for approval in principle only, as his own witness, DW2, an officer from Jabatan Perancang had given evidence that the proper procedure was to submit the plans for approval, to MPJB.

[5] Was she right in this approach? I think that she was. There are a number I of authorities from which support may be drawn for such an approach that the trial judge here adopted. It is sufficient that I quote from two of them.

[6] The first is *Tindok Besar Estates Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, where Chang Min Tat FJ said (at p 234):

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[7] The second is *Grace Shipping Inc & Anor v CF Sharp & Co (Malaysia) Pte Ltd* [1987] 1 MLJ 257, where Lord Goff of Chieveley said (at p 265):

> And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *The Ocean Frost; Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1 when he said at p 57:
>
> > 'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'
>
> That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence.

[8] So too here. Indeed, I would go so far as to say that the learned judge was extremely fair in her treatment of the appellant as a witness. Having carefully studied his oral evidence and having compared it with the contemporaneous documents, there is no doubt in my mind that that any reasonable tribunal similarly circumstanced as the learned judge in the present instance would have concluded that the appellant was not a truthful witness. The story he told — the judge has admirably summarised it in her judgment — sounds hollow and defies belief. There is accordingly no merit in the appellant's submission that the first issue should be resolved in his favour.

[9] Equally, there is no merit in the appellant's submission that the learned judge overlooked in dealing with the second issue. A careful study of her judgment, such as that to which I have subjected it, reveals that the findings she made dealt a fatal blow to the appellant's hollow assertion that he was not personally liable to the respondent. Implicit in the judge's treatment of

the appellant's case and in the rejection of his hollow story is a finding that the appellant had acted in his own person in appointing the respondent and had undertaken personal responsibility for the latter's fee. To illustrate the point, I draw attention to the language in which the learned judge couched her findings in the passage in her judgment which I have already reproduced.

[10] This is a case where the appellant signed the documents material to the appointment of the respondent without any qualification. I therefore think that, as a matter of principle, he must be held to have personally bound himself to the respondent in the matter of the latter's appointment. And I find the principle supported by respectable authority. There are three leading cases on the point. They were all discussed in the former Federal Court by Lee Hun Hoe CJ (Borneo) in *Ching Yuen Tung v BEP Akitek* [1978] 1 MLJ 211. That is a case much similar to the present. For, there too, the plea was taken that the architect should look to someone else for payment. This is how the learned Chief Justice of Borneo dealt with it (at p 212):

> Appellant's case is that respondents should look to his principal for payment. On the other hand, counsel for respondents said the work was carried out at the special request of appellant. Respondents' case rested on the arrangements between the parties. Payment was made by appellant in respect of the Po Hing project. The present valuation report was based on the same terms as Po Hing project and respondents expected payment from appellant also. 'CD Co' were outside the jurisdiction and respondents would not have given credit to foreign firms. The learned judge gave judgment for respondents with costs. Appellant appealed.
>
> In *Higgins v Senior* (1841) 8 M and W 824 there was an agreement in writing for the sale of goods which purported on the face of it to be made by the defendant and was subscribed by him. The defendant sought to avoid liability by proving that he had made the agreement as agent for a third person and this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability.
>
> There was no suggestion that payment would not be made by appellant but by his principal. If an agent contracts in such a form as to render himself personally responsible he cannot afterwards, whether his principal is disclosed or not at the time of the contract, relieve himself of responsibility. The test here is whether appellant had contracted in such a way as to make himself personally liable having regard to the surrounding circumstances.
>
> In *Calder v Dobell* LR 6 CP 486, a broker called Cherry, contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. Defendant argued that the court should consider the distinction between the case where one party was not aware when making the contract that the other was acting as an agent and the case where he was aware of that fact but nevertheless contracted with the agent personally. In the former, the principal would be sued but not in the latter case. The argument was rejected. Kelly CB said at p 499 that:
>
> > 'The contract was made in the name of Cherry, the agent but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election.'

Higgins v Senior 8 M & W 834 and *Calder v Dobell* LR 6 CP 486 were applied in *Basma v Weekes & Ors* [1950] AC 441. In that case, appellant claimed for specific performance of an agreement by which the first three respondents had agreed to sell

to him two houses, of which they were tenants in common. Respondents pleaded, inter alia, that the agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agent for the appellant who was the principal and that the agreement did not identify the appellant as purchaser. Held that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent. It was also held that the agreement which was made in his name did not cease in that event to contain the names of the contracting parties, and therefore did not cease to satisfy the Statute of Frauds; and, accordingly that, as the agent could have sued on the contract, so could his principal, the appellant.

[11] That brings me to the third and final point. It has to do with the quantum of fees for which the learned judge entered judgment. The weak suggestion made by the appellant's counsel is that there ought to have been an assessment of the fee on a *quantum meruit*. The point is, I think sufficiently met by the authority relied upon by counsel for the respondent. It is *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85. At first instance Vohrah J, found for the architect. His judgment was affirmed by an unusually strong former Federal Court in *Udachin Development Sdn Bhd v Datin Peggy Taylor* [1985] 1 MLJ 121. That case is authority for the proposition that according to the trade and custom of his profession, an architect is entitled to ask for payment in accordance with the PAM scale of fees where he does the work but the building works do not for any reason commence, eg, because the project is abandoned. It was in accordance with the PAM scale of fees that the respondent made (its) claim. And that is the sum for which the learned judge entered judgment. The appellant's complaints in respect of this issue are therefore without any merit whatsoever.

[12] Taking a step back and viewing the appellant's case as a whole, I find nothing to alter the view I expressed at the outset of this judgment. That this is an appeal on a question of fact. The function of this court in an appeal such as this is well established. It is to defer to the views of the trial judge who had the obvious audio-visual advantage over oral testimony. Indeed, it would be quite wrong for this court to interfere in the present case.

[13] For the reasons already given, I would dismiss the appeal. The appellant must pay the costs of this appeal. All other orders made by the High Court are affirmed. The deposit will be paid out to the respondent to account of its taxed costs.

[14] My learned sister Siti Norma Yaakob JCA and my learned brother Mokhtar Sidin JCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon